IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

DELIAH COLYER, as Natural Mother and Next Friend of MARSHAUN BRAXTON, DECEASED, and on behalf of all Wrongful Death Beneficiaries of MARSHAUN BRAXTON, DECEASED — APPELLANTS

VS. — CASE NO. 2014-CA-01636

FIRST UNITED METHODIST CHURCH OF NEW ALBANY and JOHN DOES 1-15 — APPELLEES

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# BRIEF OF THE APPELLANT

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APPEAL FROM THE CIRCUIT COURT OF UNION COUNTY, MISSISSIIPPI

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ORAL ARGUMENT REQUESTED

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Court of Appeals and the Supreme Court may evaluate possible disqualification or recusal:

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Hon. Robert Elliott
Ripley, Mississippi
Lafayette County Circuit Court Judge (Retired)

Respectfully submitted, this the 20th day of May, 2015.

APPELLANTS

BY: /s/ JOSHUA A. TURNER

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## STATEMENT REGARDING ORAL ARGUMENT

The Appellants request oral argument in this matter, as they believe it will help to better understand this appeal. Specifically, the issue regarding a dangerous condition and the passage of time after realizing the dangerous condition exits.

## STATEMENT OF THE ISSUES

I. **The Trial Court Erred By Granting Summary Judgment As Genuine Issues of Material Fact Exist**

II. **The Trial Court Erred By Granting Summary Judgment By Considering The Waiver Of Elnora Howell and Marshaun Braxton**

## SUMMARY OF THE ARGUMENT

The trial court erred in this case by granting summary judgment. The issue of not warning the minor children about the dangerous waves in the Pacific Ocean by First United Methodist Church chaperones created genuine issues of material fact.

First United Methodist Church (hereafter referred to as "FUMC") owed a duty to Marshaun Braxton to provide him with ordinary care while supervising him on their trip to Costa Rica. Amanda Gordon was the church leader who was responsible for the children on this trip. Amanda did not do any research to investigate possible dangerous conditions of the Pacific Ocean in Costa Rica.

By the accounts even most favorable to FUMC, Amanda knew dangerous waves existed where they were in Costa Rica at least two minutes before a massive wave swept Marshaun off of a rock, killing him. Amanda never yelled out any warnings for the children to get away from the water.

This is an issue a jury must decide. The trial court stepped into the shoes of the trier-of-fact by ruling no genuine issues of material fact existed.

After being made aware of a dangerous condition, how much time must pass before the FUMC would be considered negligent?

It is unclear if the trial court relied upon the waiver arguments of FUMC in making its decision to grant summary judgment. In the event the trial court did so, none of the Appellants were bound by Elnora Howell's waiver, and Marshaun

Braxton was too young to contract at the time he signed the document, as he was seventeen years old.

## SATEMENT OF THE CASE AND FACTUAL BACKGROUND

On June 20, 2009, Marshaun Braxton, along with other minor children and some adult chaperones flew from Memphis, Tennessee to Costa Rica on a mission trip. The trip was led by Amanda Gordon, associate pastor of First United Methodist Church of New Albany, Mississippi (hereafter referred to as "FUMC"). The purpose of the trip was to construct a sanctuary in Villa Briceno, Costa Rica and conduct other mission activities.

On June 21, 2009, Marshaun, Mattie Carter, Josh Creekmore, Sam Creekmore, Amanda Gordon and Adam Gordon[1] decided to walk along the ocean and onto rock structures out in the Pacific Ocean. During the course of this walk, Marshaun, Mattie and Josh climbed on top of rocks in the Pacific Ocean in the presence of, and with the consent of, at least one adult chaperone-Sam Creekmore. While standing on those rocks, a large wave crashed upon them. Marshaun, Mattie and Josh were all swept into the ocean by the wave. Mattie and Josh were rescued. Marshaun was not rescued. He died due to drowning on June 21, 2009.

Prior to this wave killing Marshaun Braxton, Amanda Gordon knew that large waves existed at that place of the Pacific Ocean and she did nothing to warn

[1] There were other minor children, but these are the ones that are important to this appeal.

the children about the dangerous condition. At least two minutes before the wave knocked Marshaun into the ocean, a large wave knocked her six foot three, three hundred forty pound (340 lb.) husband into the rocks, cutting his hand. The sworn testimony of Josh Creekmore can be viewed in the light most favorable to the Appellants that this incident with Adam being knocked to the ground, occurred as much as fifteen or twenty minutes before the second large wave swept he and Marshaun into the ocean.

At all times during this tragic event, Marshaun was under the supervision of FUMC adults. Specifically: Amanda Gordon. FUMC even admits that it was responsible for Marshaun's care in documents submitted to the trial court.

## ARGUMENT

### I. The Trial Court Erred By Granting Summary Judgment As Genuine Issues of Material Fact Exist

The familiar standard of review involving a motion for summary judgment is as follows:

> Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted by a court *if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any*, show that there is no genuine issue as to any material fact." M.R.C.P. 56(c); *see Saucier,* 708 So.2d at 1354. The moving party has the burden of demonstrating there is no genuine issue of material fact, ***while the non-moving party should be given the benefit of every reasonable doubt. Tucker v. Hinds County,*** 558 So.2d 869, 872 (Miss.1990); *see also* ***Heigle v. Heigle,*** 771 So.2d 341,

345 (Miss.2000).

***Buchanan v. Ameristar Casino Vicksburg, Inc.***, 959 So.2d 969, 975 (Miss. 2007) (emphasis supplied).[2]

> A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. ***Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried.*** Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue.

***Russell v. Orr,*** 700 So.2d 619, 626 (Miss. 1997) citing the ***Miss. R. Evid.* 56 cmt.** (emphasis supplied).

## THE WITNESSES

It is a question for the jury whether the fact that Amanda Gordon did nothing to get the children to safety, after two minutes, fifteen minutes or twenty minutes, was negligent; and whether it was foreseeable that another large wave could injure someone else. The foreseeability is amplified by her witnessing her three hundred forty pound (340 lb.) husband knocked down by a large wave. She never warned anyone after watching her husband become injured from the wave. This is

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[2] "All evidence is viewed in the light most favorable to the non-movant." ***Dancy v. East Mississippi State Hosp.***, 944 So.2d 10, 15 (Miss. 2006) citing ***Palmer v. Biloxi Reg'l Med. Ctr., Inc.***, 564 So.2d 1346, 1354 (Miss.1990). Even if this Court were unsure in weighing the facts thus far, it has been held that summary judgment, when questionable, is not proper. See, ***Brown v. Credit Center, Inc.*** 444 So.2d 358, 362 (Miss. 1983) holding "[i]ndeed, the party against whom the summary judgment has been sought should be given the benefit of *every reasonable doubt.*" (emphasis supplied), citing ***Liberty Leasing Co. v. Hillsum Sales Corporation***, 380 F.2d 1013, 1015 (5th Cir.1967); ***Heyward v. Public Housing Administration***, 238 F.2d 689, 696 (5th Cir.1956).

significant and probative evidence that prevents summary judgment. See ***Daniels infra,*** 629 at 600.

During Amanda Gordon's deposition, she was questioned at length about research she conducted prior to taking a group of minor children to Costa Rica. She admitted that she did no research which would reveal any dangers of the beaches in Costa Rica, and no research about drowning in the Pacific Ocean.

Mr. Turner: Have you ever been on the U.S. Department of Health website?

Amanda Gordon: I've been on several travel web sites.

Mr. Turner: This isn't a travel one. United States State Department, have you ever heard of it?

Amanda Gordon: I've heard of it.

Mr. Turner: Okay. Have you ever been on their website?

Amanda Gordon: I don't recall specifically going to that one. I may have.

Mr. Turner: Prior to this trip, did you ever go to their web site to check about any kinds of dangers or security problems or beach warnings that they might have posted prior to going on this trip?

Amanda Gordon : What's the one that offers the travel advisories?

Mr. Turner: I'm not aware. I'm asking you did you go to this website?

Amanda Gordon: I don't recall.

Mr. Turner: Okay. Did you do any type of research about beach safety before going on this trip?

Amanda Gordon: **I did not, because we were going on a - - we were going on a mission trip and it wasn't a beach trip.**

Mr. Turner: You'll agree with me that Marshaun Braxton though, died on the edge of a coast; right, next to the water; correct?

Amanda Gordon: Correct.

(See *Deposition of Amanda Gordon,* **R. E.** at p. 25).

* * *

Mr. Turner: You'll agree with me that you were responsible for the minor children that were on that trip, right?

Mr. Byars: Object to the form. You may answer.

Amanda Gordon: **As a team leader I was responsible, yes.**

(See *Deposition of Amanda Gordon*, **R. E.** at p. 27) (emphasis supplied).

On the same day that Amanda Gordon was deposed regarding the death of Marshaun, her husband Adam was deposed about the drowning. Adam testified under oath that he was six foot three, and weighted three hundred forty pounds (340 lbs.) on June 21, 2009. He further testified he was knocked down by a "seven to eight foot wave" and sustained injuries as a result thereof. He did not testify about falling any other time that day. He also testified that his wife witnessed him being knocked down by this large wave. A reasonable juror could easily find that a "seven to eight foot" wave knocking down a three hundred forty pound (340 lb.) man, injuring his hand, put Amanda Gordon on notice that a dangerous condition

existed. A pure jury question itself. Adam's sworn testimony about the incident supports findings of genuine issues of material fact:

Mr. Turner: Walk me through what you remember about the day of this incident, please?

Adam Gordon: ...There was off to the right there was - - it is all kind of like volcanic rock formation - - off to the right there was a little area and then there was a middle larger hill and then there was a flat, flatter area that everybody seemed to be - - everybody, meaning the locals, the Costa Ricans and Will - - seemed to be very familiar with. Said that we'd spend a little bit of time there. And so we all kind of just split off individually. There wasn't, you know, we're going here. We're going here. We're going here. It was all within eyesight so it wasn't like everybody was going off in far different directions. I remember that there was a group of a few students that included Marshaun that went off to the rock formation to the right. Amanda went with - - there was students and adults with Marshaun - - Amanda went with some other students and some adults to the middle rock formation. And I went to the left of that in that flatter part, not with any group. I was kind of by myself. And a couple of other folks were around. Maybe 20, 30 minutes, if that, I was taking pictures and some water came up and kind of hit my feet and I thought oh, that's nice, you know, the beach. Then a little larger wave came up and hit my knees and at that point **I thought I should probably move because this isn't a safe place, smart place to stand if I'm going to stay dry. And as I turned around to take some steps to navigate back the larger beach area, I heard Amanda call out my name at which time I turned around there was probably about a seven or eight foot wave that hit me and through me into the rocks and cut my arm open pretty bad and cut my hand.**

(See *Deposition of Adam Gordon,* **R. E.** at pp. 59-61) (emphasis supplied).

* * *

Mr. Turner: How tall are you?

Adam Gordon: I'm six-two, six-three.

Mr. Turner: And what was your weight at the time? There's a reason for that.

Adam Gordon: Yeah. 340ish maybe, 340, 350.

(See *Deposition of Adam Gordon,* **R. E.** at p. 67).

Neither Amanda nor Adam took any steps to get the other members of the trip away from the water after Adam was knocked down and injured. If Amanda had been diligent and shouted warnings, as she shouted to her husband when she saw the large wave about to hit him, Marshaun would be alive today.

Lastly, Josh Creekmore testified that he witnessed Adam get knocked to the ground fifteen to twenty minutes before the large wave swept he, Marshaun, and Mattie Carter into the water. Importantly, Adam only testified to falling down once as he was thrown into a rock structure by the "seven to eight foot wave." Josh Creekmore's recollection of this sad day was as follows:

Mr. Turner: This is Exhibit 3. Do you recognize that picture?

Josh Creekmore: Yes, sir, I do.

Mr. Turner: What does that picture show?

Josh Creekmore: Shows people climbing on the rock.

Mr. Turner: Okay. And is that the rock that you and Marshaun were swept off of?

Josh Creekmore: Yes, sir.

Mr. Turner: All right. Can you name the people in that picture?

Josh Creekmore: From left to right, I would say that's my father, myself, Marshaun Braxton, Mattie Carter, and Mr. Mike Carter. And then I don't know the two people higher up on the rock. I don't recall them.

Mr. Turner: Okay.

Josh Creekmore: I don't remember who they are.

Mr. Turner: And I think I asked you this, but does this truly and accurately depict the rock and the people that you've named on it prior to you guys being swept into the ocean?

Josh Creekmore: Yes, sir.

Mr. Turner: Okay. Let me show you what's been marked as Exhibit 4, which is similar. Can you identify this picture?

Josh Creekmore: Yes, sir.

Mr. Turner: What is that?

Josh Creekmore: That's closer to the point where we were swept off.

Mr. Turner: Same rock; right?

Josh Creekmore: Yes, sir.

Mr. Turner: Can you identify any of the people in picture?

Josh Creekmore: Yes, sir. From left to right, its my dad, Mattie Carter, myself, Mr. Mike Carter, Marshaun, and then I don't know the people on the top.

Mr. Turner: Okay.

Josh Creekmore: I don't remember them.

Mr. Turner: From - - point to yourself in that picture, please.

Josh Creekmore: (Witness complies.) I'm right there between Mattie and Mr. Mike.

Mr. Turner: Okay. And where's Marshaun?

Josh Creekmore: He's right there at the back.

Mr. Turner: Far right?

Josh Creekmore: Yes, sir. Far right.

Mr. Turner: And the elevation that you guys are standing on, is that where y'all were swept off, or was it - -

Josh Creekmore: We walked down to right there, this point (indicating).

Mr. Turner: This is Exhibit 4. I'm going to ask you to mark on Exhibit 4 where it is that you were when you were swept off - - or you and Mar- -- was Marshaun right there with you?

Josh Creekmore: Yes, sir.

Mr. Turner: Okay. Mark where Marshaun was when he was swept off - - I'm assuming you were right there with him, I don't know - - but mark where Marshaun was when he was swept off, please sir, with an "X."

Josh Creekmore: (witness complies).

Mr. Turner: Will you initial it, please?

Josh Creekmore: "JC" for me?

Mr. Turner: Well, yes, sir. I need your initials. Thank you.

(*Deposition of Samuel "Josh" Creekmore,* **R. E.** at pp. 90-93).; (Also, see Picture Exhibits 2, 3 and 4 to Josh Creekmore's Deposition, **R. E.** at pp. 100, 101 and 102).

* * *

Mr. Turner: How far would you say it was from the - -what I'm going to call the beach, dry sand, to that rock?

Josh Creekmore: Thirty feet, 40 feet - - 30, 40 feet. It wasn't that far of a hike.

Mr. Turner: Was there water all the way around that rock?

Josh Creekmore: Yes, sir.

Mr. Turner: When you walked out to that rock, did you have to go through water to get to it?

Josh Creekmore: Yes, sir.

Mr. Turner: How deep was it?

Josh Creekmore: Ankle deep, if that.

Mr. Turner: Okay. At any time while you guys were out there, was there water deeper than that all the way around that rock?

Josh Creekmore: On the front side that we fell off.

(*Deposition of Samuel "Josh" Creekmore,* **R. E.** at pp. 94-95).

* * *

Mr. Turner: Okay. At any point during that day, do you remember Adam Gordon getting knocked down by a large wave?

Josh Creekmore: I remember him slipping.

Mr. Turner: Okay. I'm going to represent to you that he testified that he was knocked down by a seven- to eight-foot wave.

Josh Creekmore: Okay.

Mr. Turner: Would that have been before or after ya'll's - -

Josh Creekmore: Before.

Mr. Turner: Before? Before ya'll were swept into the ocean?

Josh Creekmore: Uh-huh (affirmative response).

Mr. Turner: Okay. Did you know about that or see it from where you were?

Josh Creekmore: I saw him getting up.

Mr. Turner: Okay. How long before that incident, before you guys were knocked off, you and Marshaun were knocked off that rock?

Josh Creekmore: Fifteen, 20 minutes.

(*Deposition of Samuel "Josh" Creekmore,* **R. E.** at p. 96).

**FUMC OWED A DUTY TO MARSHAUN**

As to the merits of this case, FUMC alleges it did not have a duty to supervise Marshaun. Why send any adults at all on the trip then if that were the case? The answer is because the minors could not contract, could not get a hotel room, and needed supervision. FUMC undertook, and assumed a duty to supervise Marshaun, as well as all of the minor children that traveled to Costa Rica.

FUMC submitted a Motion for Summary Judgment to the trial court with a Youth Medical/Parental Consent Form, a document that FUMC purports to be

dispositive of this case.[3] The pertinent parts of this document are shown with emphasis below:

> To whom it may concern:
>
> I, the undersigned, do hereby give permission for my child (named above) to attend and participate in activities and trips sponsored by First United Methodist Church of New Albany, Mississippi.
>
> ***I authorize any of the youth counselors/chaperones, In whose care my child has been entrusted,*** to consent to any X-ray, examination, anesthetic, medical, surgical or dental diagnosis or treatment, and hospital care, to be rendered to my child under the general or special supervision and on the advice of any licensed physician or dentist, whether such diagnosis or treatment is rendered at the office of said physician or at a hospital.
>
> I shall be liable and agree to pay all costs and expenses incurred in connection with such medical and dental services rendered to the aforementioned child pursuant to this authorization.
>
> Should it be necessary for my child to return home due to medical reasons, disciplinary reasons, or otherwise, I, the undersigned, shall assume all transportation costs.
>
> ***I do hereby give my permission for my child to ride in any vehicle designated by the youth counselor/chaperone in whose care the minor has been entrusted*** while attending and participating in activities sponsored by First United Methodist Church of New Albany, Mississippi.

(**R. E.** at p. 103) (emphasis supplied).

FUMC admitted that it had a duty to supervise Marshaun Braxton in the document quoted above. FUMC should be *judicially estopped* from claiming that there is/was no duty owed to Marshaun. "*Judicial estoppel* precludes a party from asserting a position, benefitting from that position, and then, when it becomes more

[3] The Appellants deny this assertion, but the language in the document clearly shows a duty exists.

convenient or profitable, retreating from that position later in the litigation." ***Richardson v. Cornes,*** 903 So.2d 51, 56(¶ 17) (Miss.2005) (quoting ***Dockins v. Allred,*** 849 So.2d 151, 155(¶ 8) (Miss.2003)). "Because of *judicial estoppel,* a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation." ***Id.***

Under the current facts, this Court should find a duty exists from the statements by FUMC, the actions of the chaperones, and the documents clearly state that FUMC was responsible for Marshaun's care. The Appellants ask that this Court disregard any notion by FUMC that no duty existed. FUMC openly accepted responsibility of Marshaun's welfare and supervision by chaperoning him on his trip to Costa Rica.

**FUMC BREACHED ITS DUTY TO MARSHAUN**

Amanda Gordon watcher her husband, Adam, a three hundred forty pound (340 lb.) man get knocked to the ground, and injured, by a "seven to eight foot wave" prior to Marshaun being killed by another large wave. The time over which passed before that second wave swept Marshaun into the ocean is in controversy. According to Adam: two to three minutes passed. According to testimony from Josh Creekmore, a reasonable juror could conclude that fifteen to twenty minutes passed before he and Marshaun were swept off the rocks structure. Either way, Amanda Gordon did nothing.

FUMC breached its duty to Marshaun by failing to warn him and keep him away from dangerous waves and hazardous conditions on rocks overlooking the Pacific Ocean.

## FUMC'S FAILURES CAUSED MARSHAUN'S DEATH

The failure to supervise, warn and care for Marshaun, caused him to be in a dangerous location, one that he had never experienced before. Amanda Gordon-FUMC was responsible for Marshaun's safety. Unfortunately, FUMC's failures caused Marshaun to be swept into the ocean, where he drowned. But for the chaperones of FUMC allowing Marshaun to venture onto these dangerous rocks, he would not have died.

## INJURY

It is undisputed that Marshaun died as a result of drowning after being swept away by a large wave in Costa Rica, while under the care of adults who were the agent/chaperones of the trip sponsored by FUMC.

## A REASONABLE PERSON COULD FIND THAT IT IS FORESEEABLE A MINOR COULD DROWN ON A DANGEROUS ROCK STRUCTURE IN THE PACIFIC OCEAN

FUMC has also alleged that the incident that occurred was not a foreseeable incident. It is the Appellants' position that the incident in question was foreseeable. A reasonable person should have know that climbing on rocks overlooking the Pacific Ocean in an unknown country could result in being washed

into the sea. "...*[I]n satisfying the requirement of foreseeability, a plaintiff is not required to prove that the exact injury sustained by the plaintiff was foreseeable; rather, it is enough to show that the plaintiff's injuries and damages fall within a particular kind or class of injury or harm which reasonably could be expected to flow from the defendant's negligence.*" ***Glover ex rel Glover v. Jackson State University,*** 968 So.2d 1267, 1278 (Miss. 1997) (emphasis supplied) ***Id.****; see also* ***Gulledge,*** 880 So.2d at 293. *"[T]he 'inquiry is not whether the thing is to be foreseen or anticipated as one which will probably happen, but whether it is likely to happen, even though the likelihood may not be sufficient to amount to a comparative probability.'* " ***Gulledge v. Shaw,*** 880 So.2d 288 (Miss. 2004) (emphasis supplied) ***Rein,*** 865 So.2d at 1145 (quoting ***Gulf Ref. Co. v. Williams,*** 183 Miss. 723, 185 So. 234, 236 (1938)).

The foreseeability in this case is evident, but should the this Court find it questionable then it should be a matter for the jury, as a reasonable juror could find that it was foreseeable that Marshaun Braxton would be harmed by walking on dangerous rocks that were next to the Pacific Ocean in a country that he had never visited.

"All evidence is viewed in the light most favorable to the non-movant." ***Dancy v. East Mississippi State Hosp.,*** 944 So.2d 10, 15 (Miss. 2006) citing ***Palmer v. Biloxi Reg'l Med. Ctr.,*** *Inc.,* 564 So.2d 1346, 1354 (Miss.1990). "Before summary

judgment is granted, the lower court must determine if there are material factual questions in issue over which reasonable jurors could disagree." ***Herrington v. Leaf River Forest Products***, 733 So.2 774, 776 (Miss. 1999).

The trial court erred when it found no genuine issues of material fact exist in this case. Reasonable jurors would have the following facts in front of them that cannot be refuted:

A. Amanda Gordon testified she did not do any research about beach dangers prior to taking Marshaun Braxton to Costa Rica. (See *Deposition of Amanda Gordon,* **R. E.** at p. 25).

B. Adam Gordon, a 340 lb. man, testified he was knocked down by a seven to eight foot wave and injured his hand when he was thrown into the rocks. (See *Deposition of Adam Gordon,* **R. E.** at p. 61).

C. Adam Gordon testified that two minutes after he got up from being knocked down by the wave he realized that there was a problem with the children on the rocks. (See *Deposition of Adam Gordon,* **R. E.** at p. 63).

D. Amanda Gordon witnessed Adam Gordon being thrown down, and injured by this seven to eight foot wave. She even yelled out to him to warn him. (See *Deposition of Adam Gordon,* **R. E.** at p. 61).

E. Adam Gordon only testified to falling down one time, which is when the wave knocked him down. (See *Deposition of Adam Gordon*, **R. E.** at 61).

F. Amanda Gordon testified that she never warned the children on the rocks about any dangers at any time. (See *Deposition of Amanda Gordon*, **R. E.** at pp. 26 and 33).

G. Josh Creekmore saw Adam Gordon fall down fifteen to twenty minutes before he and Marshaun Braxton were swept off of the rocks in the middle of the Pacific Ocean. (See *Deposition of Samuel "Josh" Creekmore*, **R. E.** at pp. 95-96).

These facts taken in the light most favorable to the Appellants provide genuine issues of material facts. Amanda Gordon (the associate pastor of First United Methodist Church and supervisor in charge on the trip to Costa Rica) owed a duty to Marshaun, she breached that duty, and her failures caused his death.

Amanda's first act of negligence was that she did not do any research about the dangers of being on rocks in the middle of the Pacific Ocean in Costa Rica. Her second act of negligence was that she failed to warn Marshaun and the other children to get away from the water, and off of those rocks after watching her husband get knocked down, and injured by a large wave. Amanda Gordon's negligence caused Marshaun Braxton's death.

FUMC argued that there was no notice of any dangers while Marshaun Braxton was on the rocks before being swept away to his death. However, the sworn testimony of Amanda Gordon, Adam Gordon and Josh Creekmore provides

different evidence. Even if there are inconsistent recollections of the events, which there are, the facts and inferences taken in the light most favorable to the Appellants, must be weighed in favor of the non-movants-Appellants.

The Supreme Court reversed summary judgment of negligent supervision of a two (2) year old at a church in West Point, Mississippi. There was a lapse in time of two or three minutes where the adults were not supervising the children. The trial court granted summary judgment and the Supreme Court reversed finding:

> The elements of a prima facie case of negligence are duty, breach, causation, and damages. *Grisham v. John Q. Long V.F.W. Post, No. 4057, Inc.*, 519 So.2d 413, 416 (Miss.1988) (citing *Burnham v. Tabb*, 508 So.2d 1072 (Miss.1987); *Boyd v. Lynch*, 493 So.2d 1315 (Miss.1986); *Marshall v. Clinic for Women, P.A.*, 490 So.2d 861 (Miss.1986)). Duty and breach must be established first. *Strantz ex rel. Minga v. Pinion*, 652 So.2d 738, 742 (Miss.1995). The elements of breach and proximate cause must be established by the plaintiff with supporting evidence. *Simpson v. Boyd*, 880 So.2d 1047, 1050 (Miss.2004). The parties agree that First Baptist owed a duty to Lily and Todd. Therefore, the fact issues of breach and proximate cause to be determined by the jury must be supported by the plaintiff with credible evidence. ***The record reflects that testimony, when viewed in the light most favorable to Todd, as required by law, could support a jury verdict in favor of Todd. Should the jury find that Ward breached her duty when she did not keep the children in sight for two or three minutes, the jury could reasonably find for Todd.*** "When doubt exists whether there is a fact issue, the non-moving party gets its benefit." *Glover v. Jackson State Univ.*, 968 So.2d 1267, 1275 (Miss.2007) (quoting *Brown v. Credit Ctr., Inc.*, 444 So.2d at 362).

***Todd v. First Baptist Church of West Point,*** 993 So.2d 827, 829 (Miss. 2008) (emphasis supplied).

In ***Summers ex rel Dawson v. St. Andrews Episcopal School Inc.,*** 759 So.2d 1203 (Miss. 2000) an eight (8) year old girl and her parents sued St. Andrews school for negligent supervision. One day while she was on the playground, some of the other students pulled her clothes off and exposed her privates. She called for help and no one came to help her. A second group of students walked up, and the same set of students who accosted her originally, pulled her pants down once again. The teachers were all sitting at a table and these actions occurred outside of the teachers' sight. The trial court granted summary judgment as to negligent supervision. ***Id.***

Our Supreme Court reversed the trial court holding, and found a case out of New York persuasive on the adequacy of supervision after one of the school's defenses was that it employed one teacher for every sixteen students. ***Id.*** The Supreme Court held "adequacy of supervision" is always a jury issue. See ***Summers*** at 1214 (Miss. 2000) citing ***James v. Gloversville Enlarged Sch. Dist.,*** 155 A.D.2d 811, 548 N.Y.S2d 87, 88-89 (1989) and see also ***Todd*** at 830; holding: "**[a]** ***jury must decide what constitutes proper and adequate supervision*** . . ." (emphasis supplied).

In ***Downs v. Choo***, 656 So.2d 84 (Miss. 1995) the Supreme Court addressed a slip and fall case on a banana peel at a grocery store, where the trial court granted summary judgment. The Supreme Court reversed this finding and held:

> There was a dispute as to the ***timely*** and non-negligent removal of the banana from the produce bin by the store employees. The plaintiff should have been allowed to present his evidence in a trial below to settle the disputed issue by the jury.

***Id.*** at 86. (emphasis supplied).

In ***Henderson v. Simpson Co. Public School Dist.***, 847 So.2d 856 (Miss. 2003) Henderson was an eleven (11) year old who was helping another student with some school work in a classroom. Price, another student in the classroom was mouthing threatening and taunting language toward Henderson. Price then walked over to Henderson's desk and threatened Henderson with his fist for "approximately one minute." Price then struck Henderson, cracking a tooth. All of this occurred with the teacher only a few feet away. The trial court granted summary judgment finding there was no genuine issue of fact. The Supreme Court reversed this finding and held that an "issue of fact as to whether the teacher had ***adequate time*** and, indeed, a duty to intervene in the situation while Price was standing over Henderson brandishing his fist for at least one minute." ***Id.*** at 857. (emphasis supplied).

Another case that is helpful is ***Piggly Wiggly of Greenwood v. Fipps,*** 809 So.2d 722 (Miss. Ct. App. 2001) from this Court. Fipps sued Piggly Wiggly for a slip and fall in a puddle of vomit in the defendants' grocery store. One person testified that the vomit had been on the floor for "twenty minutes." ***Id.*** at 724. A security guard testified that there was no vomit on the floor during the security sweep

immediately before the fall. He testified that he made his round from the location and returned to the spot of the fall in less than five minutes from where Fipps had already fallen. ***Id.*** The trial court denied summary judgment and the defendants appealed after a jury verdict in favor of the plaintiff. This Court found that "summary judgment was properly denied because there was conflicting testimony about the existence of a warning sign at the time of the fall and its adequacy and ***how long*** the vomit was on the floor prior to the fall are all factual questions for the jury." ***Id.*** at 726. (emphasis supplied).

***Choo, Henderson*** and ***Fipps*** all have genuine issues of material facts that relate to time. Like those three cases, this case also presents a factual issue of whether it was reasonable to not give a warning to Marshaun Braxton within two minutes, fifteen minutes, or possibly twenty minutes.

A reasonable juror could weigh the facts in question and return a verdict in favor of the Appellants. Specifically:

A. Reasonable jurors could believe Amanda Gordon was negligent for her failure to research the dangers of Pacific Coast beach dangers and drownings in Costa Rica.

B. Reasonable jurors could believe it was negligent for Amanda Gordon to allow Marshaun Braxton and the other children to go onto a dangerous rock structure in the middle of the Pacific Ocean without any knowledge of the

oceanic activity in Costa Rica. (See pictures of Marshaun Braxton on said rock structure; **R. E.** at pp. 100, 101).

C. Reasonable jurors could easily believe Josh Creekmore witnessed Adam Gordon fall down after being knocked to the ground fifteen to twenty minutes before he, Mattie Carter, and Marshaun Braxton were swept off of the rocks in the middle of the Pacific Ocean.

D. Reasonable jurors could undoubtedly believe Amanda Gordon was negligent for never taking any action to warn Marshaun Braxton and the other children to get off of the rocks and get to safety, whether she had two minutes to do so, fifteen minutes to do so, or twenty minutes to do so.

A human being can easily travel "30 to 40 feet"[4] in two minutes; especially three minor children in average physical condition. Not once after watching her husband fall to the ground did she say: "Hey everyone, get away from the water. It is dangerous." Even though her very large husband was knocked to the ground and injured by a large wave.

Amanda Gordon did no research to educate herself, and in no way provided a warning to the children she was chaperoning to a different country with dangerous waves. Once Amanda Gordon knew about the dangerous wave knocking her husband to the ground, she did nothing. Whether two minutes passed, fifteen

[4] Distance from the rocks that Marshaun Braxton was on to dry sand, as testified to by Josh Creekmore. (**R. E.** at pp. 94-95).

minutes passed, or twenty minutes passed, she still did nothing to get the minor children off the rock structure in the middle of the ocean. (**R. E.** at pp. 26 and 33).

The Appellants ask this Court to reverse and remand this case, as summary judgment was not proper. Genuine issues of material facts exist and the family of Marshaun Braxton were denied their fundamental 7th Amendment rights to a jury trial. **U.S. Const. Amend.** VII.

## II. The Trial Court Erred By Granting Summary Judgment By Considering The Waiver Of Elnora Howell and Marshaun Braxton

The trial Court's order denying summary judgment does not address FUMC's argument about the waiver signed by Marshaun Braxton and by his grandmother, Elnora Howell. (See **R. E.** at p. 104). Even after a request for a Finding of Fact and Conclusions of law request, there is still no clarification. (See *Order,* **R. E.** at p. 5) As such, Appellants address the arguments of FUMC and why the argument does not coincide with contract principals.

FUMC relies heavily on a "Parental Consent Form" (See **R. E.** at p. 104) and the "Missioner Profile and Release of Claim" (See **R. E.** at p. 105). Elnora Howell, who was Marshaun Braxton's grandmother, allegedly signed the "Parental Consent Form". She is not a party to this action. The Defendant cites to no authority, which binds the Plaintiffs to the consent form. Plainly, because there

is no authority which makes the natural mother and Marshaun's siblings third party beneficiaries to a consent form signed by Elnora Howell.[5]

In fact, ***Adams v. Greenpoint Credit LLC***, 943 So.2d 703 (Miss. 2006) directly contradicts FUMC's argument that the Appellants should be bound by Elnora Howell's signature waiving liability. In ***Adams***, a man and his wife purchased a mobile home and signed an arbitration agreement. Later, Greenpoint drafted money from an account owned by Adams and his daughter. A dispute arose over the drafting of this money by Greenpoint. The daughter did not sign the arbitration agreement. The Court found that the daughter was not bound by the arbitration agreement, and the following language is on point here:

> Nothing in the plain language of the arbitration provision indicates a clear intent of the parties to make Brown a third-party beneficiary. She did not sign the contract, was in no way alluded to in the contract, and, based on the record before us, received no benefits from the contract. As a non-signatory, non-third-party beneficiary, Brown is effectively a stranger to the contract. Furthermore, her suit is not "to maintain an action for its breach [;]" *Burns*, 251 Miss. at 796, 171 So.2d at 325, there is no evidence that the contract was "entered for [her] benefit[;]" *id.*, there is no evidence that any benefit flowed to her as a "direct result of the performance within the contemplation of the parties as shown by its terms[;]" *id.*, or that her suit "spring[s] from the terms of the contract itself." *Id.* As Brown is *not* a third-party beneficiary to whom the benefits of the contract attach, she is not bound by the arbitration provision.

***Id.*** at 709.

[5] Or, in this case to exclude the natural mother and siblings by attempting to make them thirty party beneficiaries to a "contract" executed by the guardian/grandmother.

"Ordinary contract principles require a meeting of the minds between the parties in order to be valid." ***American Heritage Life Ins. Co. v. Lang***, 321 F.3d 533, 538 (5th Cir. 2003) (internal quotations omitted) (quoting ***Louisville & N.R. Co. v. Kentucky***, 161 U.S. 677, 692 (1896) (holding that "[i]t is *a fundamental principle in the law of contracts that, to make a valid agreement, there must be a meeting of the minds*)). (emphasis supplied). [A] contract cannot bind a nonparty." ***EEOC v. Waffle house***, 534 U.S. 279, 294 (2002).

Elnora Howell was Marshaun's grandmother and guardian. She bound herself to the provisions in the Parent Consent Form, but she did not bind the Appellants. None of the Appellants are, or were, a party to the contract. None of them knew the document even existed.

Lastly, Marshaun was seventeen (17) years old when he allegedly signed the Missioner Profile and Release of Claim form. (See **R. E.** at p. 105). Simply put, Marshaun Braxton was not old enough to sign a contract. See ***Miss. Code Ann.*** § 93-19-13 (1972, as amended). If he did sign it, it certainly was not out of necessity.

The Appellants ask this Court to decline to find the arguments of FUMC persuasive. None of the authority cited by FUMC in its motion for summary judgment is dispositive of the claims of the non-signatories, and none of the

authority and affidavits presented would prevent this case from having a jury decide the merits.

## CONCLUSION

Should a reasonable person investigate into the dangers of taking children to a foreign country's beach? How much **time** has to pass before warning the children to get away from the water?

Respectfully, these are the very questions a jury needs to decide. "[A]ll motions for summary judgment should be viewed with great skepticism, and if the trial court is to err, it is better to err on the side of denying the motion." ***Summers ex rel Dawson v. St. Andrews Episcopal School Inc***, 759 So.2d 1203, 1214 (Miss. 2000) citing ***Daniels,*** 629 So.2d 595, 599 (Miss. 1993).

The Appellants respectfully request that this Court reverse the ruling of the trial court, and reverse and remand this case for a jury trial.

Respectfully submitted, this the 20th day of May, 2015.

APPELLANTS/DELIAH COLYER

BY: /s/ JOSHUA A. TURNER

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## CERTIFICATE OF SERVICE

This is to certify that I, Joshua A. Turner, have this day served via electronic mail, a true and correct copy of the above and foregoing pleading to the following:

Trey Byars Esq.
Luke Benedict Esq.
Daniel Coker Horton & Bell
Oxford, Mississippi 38655

**Via U.S. Mail**
Hon. Kelly Luther
Circuit Court Judge
102 North Main Street
Ripley, Mississippi 38663

Certified this the 20th day of May, 2015.

/s/ JOSHUA A. TURNER